

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

THE REINFORCED EARTH COMPANY,

Civ. No. 11-260 (JRT/LIB)

Plaintiff,

v.

**REPORT AND
RECOMMENDATION**

GRANITE RE, INC. AND TMS CONSTRUCTION INC,

Defendants.

&

TARRAF CONSTRUCTION INC.

Defendant, Cross-Claim and
Third-Party Plaintiff.

v.

TMS CONSTRUCTION, INC. AND TODD M. SCHMIDT.

Cross-Claim Defendants and
Third-Party Defendants.

This matter came before the undersigned United States Magistrate Judge upon the routine supervision of cases and upon an assignment made in accordance with 28 U.S.C. 636(b)(1)(A). Plaintiff commenced this action on February 2, 2011. (Docket. 1). On February 9, 2011, Defendant TMS Construction, Inc. was served. (Docket No. 4). Moreover, Todd Schmidt was served with a Third-Party Complaint on March 3, 2011. (Docket No. 7). On July 29, 2011, it having appeared that 21 days had passed since TMS Construction, Inc. and Todd M. Schmidt were served, and that they had not filed an answer or responsive motion, as required by Rule 12, the Court directed Plaintiff and Defendant/Third-Party Plaintiff as follows:

1. Again notify the Defendant TMS Construction, Inc. and Third-Party Defendant Todd M. Schmidt that they are required to make an appearance or move for an extension of time to do so;

2. File an application for entry of default unless the required pleading is filed within 15 days;
3. Advise the Court in writing of any good cause to the contrary.

Unless counsel for Plaintiff and Defendant/Third-Party Plaintiff comply with this order within 20 days of today's date, this case will be dismissed for lack of prosecution against TMS Construction, Inc. and Todd M. Schmidt.

(Docket. 12). It has now been more than 20 days and the Todd M. Schmidt and TMS Construction, Inc. have not filed an answer or responsive motion, and Plaintiff and Defendant/Third-Party Plaintiff have not filed an entry of default against the Todd M. Schmidt or TMS Construction, Inc., nor have they advised the Court of any good cause for such failure.

As a consequence, the Court finds that Plaintiff and Defendant/Third-Party Plaintiff have failed to abide by the terms of the Court's July 29, 2011 Order. Since the Court has forewarned Plaintiff and Defendant/Third-Party Plaintiff of the potential consequences for this failure to abide by the Court's orders, the Court recommends that this action be dismissed as against TMS Construction, Inc. and Todd M. Schmidt for failure to comply with the Court's July 29, 2011 Order, and for lack of prosecution.

Based on the foregoing and all of the files, records and proceedings herein,

IT IS HEREBY RECOMMENDED that:

1. This action be dismissed without prejudice as against TMS Construction, Inc. and Todd M. Schmidt for failure to comply with the Court's Order of July 29, 2011, and for lack of prosecution.

DATED: September 6, 2011

s/Leo I. Brisbois

LEO I. BRISBOIS
United States Magistrate Judge

NOTICE

Pursuant to Local Rule 72.2(b), any party may object to this Report and Recommendation by filing with the Clerk of Court, and serving all parties **by September 21, 2011**, a writing that specifically identifies the portions of the Report to which objections are made and the bases for each objection. A party may respond to the objections within fourteen days of service thereof. Written submissions by any party shall comply with the applicable word limitations provided for in the Local Rules. Failure to comply with this procedure may operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals. This Report and Recommendation does not constitute an order or judgment from the District Court, and it is therefore not directly appealable to the Court of Appeals.